

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Aquatic Resources
Honolulu, Hawaii 96813

July 22, 2009

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

REQUEST FOR AUTHORIZATION TO USE ADMINISTRATIVE PENALTY GUIDELINES
WHEN EVALUATING STONY CORAL VIOLATIONS UNDER HAWAII
ADMINISTRATIVE RULES SECTION 13-95-70.

Submitted for your consideration and approval is a request to authorize the Division of Aquatic Resources' use of the Administrative Penalty Guidelines, which were developed by Staff, for the purpose of evaluating stony coral natural resource enforcement cases presented to the Board of Land and Natural Resources.

This internal guidance document, submitted as Exhibit A, puts into writing the process Staff has used when evaluating natural resource damage cases. The guidelines strive to ensure that fines are large enough to deter noncompliance, that violators are treated fairly, and that penalties for similar violations are generally consistent, while at the same time allowing the Board flexibility in arriving at specific penalty amounts

These guidelines are for enforcement of stony coral resource violations only, but they may be used as a template for other natural resource violation guidelines in the future.

Staff suggests that fines and fees paid to the Department by a party for harm to natural resources are best allocated towards conservation and management of those natural resources. There is great need for funding for restoration or compensatory mitigation of coral reef resources, education and public outreach related to coral reefs, and marine-based enforcement efforts.


RECOMMENDATION:

1. That the Board authorize the Division of Aquatic Resources to use Staff's Administrative Penalty Guidelines as detailed in Exhibit A when evaluating a stony coral natural resource enforcement case.
2. That the Board, wherever possible, expend fines authorized in a stony coral enforcement action on the following: restoration or compensatory mitigation of coral reef resources; education and public outreach related to coral reefs; and marine-based enforcement efforts.

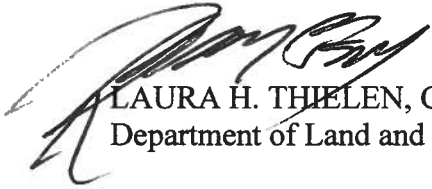
July 22, 2009

Respectfully submitted,



 DAN POLHEMUS, Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN, Chairperson
Department of Land and Natural Resources

Attachment

ADMINISTRATIVE PENALTY GUIDELINES
RULES REGULATING THE TAKING AND SELLING OF CERTAIN MARINE RESOURCES
13-95-70, HAWAII ADMINISTRATIVE RULES, STONY CORALS

DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF AQUATIC RESOURCES

July 22, 2009

A. Purpose

The purpose of these penalty guidelines is to provide the Division of Aquatic Resources (“DAR”) a logical framework within which to evaluate marine resource enforcement cases that DAR will submit to the Board of Land and Natural Resources (“the Board”). The guidelines strive to ensure that fines are large enough to deter noncompliance, that violators are treated fairly, and that penalties for similar violations are generally consistent, while at the same time allowing the Board flexibility in arriving at specific penalty amounts.¹

The procedures set out in this document are intended solely for the guidance of DAR and the Board. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the State. The Board, DAR, and the Department of Land and Natural Resources (“DLNR”) reserve the right to act at variance with these guidelines and to change them at any time without public notice.

B. Applicability

The guidelines apply to administrative enforcement of marine resource cases submitted to the Board by DAR under Title 13, Chapter 95, Section 70 of the Hawaii Administrative Rules:

- (a) It is unlawful for any person to take stony coral, or to break or damage any stony coral with a crowbar, chisel, hammer, or any other implement.
- (b) It is unlawful for any person to sell any stony coral; except that stony coral rubble pieces or fragments imported for the manufacture and sale of coral jewelry or stony coral obtained through legal dredging operations in Hawaii for agricultural or other industrial uses may be sold.

¹ For additional information on agency approaches to calculating administrative penalties, refer to the penalty guidelines published by the United States Environmental Protection Agency (“EPA”) and the State of Hawaii Department of Health (“DOH”).

A listing of the EPA’s civil penalty policies is available at:
<http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/>.

The EPA’s 1991 Clean Air Act Stationary Source Civil Penalty Policy is available at:
<http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/penpol.pdf>.

The EPA’s 1995 Interim Clean Water Act Settlement Penalty Policy is available at:
<http://www.epa.gov/compliance/resources/policies/civil/cwa/cwapol.pdf>.

The EPA’s 1998 Clean Water Act Section 311 Civil Penalty Policy is available at:
<http://epa.gov/compliance/resources/policies/civil/cwa/311pen.pdf>.

The EPA’s 2001 Revised Clean Water Act Section 404 Settlement Penalty Policy is available at:
<http://www.epa.gov/compliance/resources/policies/civil/cwa/404pen.pdf>.

The DOH’s 1999 Clean Water and Wastewater Programs Administrative and Civil Penalty Policy is available in hard-copy at the DOH Clean Water Branch.

These guidelines are supplemental to any decision to revoke or suspend a license or permit, if applicable. These guidelines do not apply to actions adjudicated in a court of law.

C. Statutory Authority for Penalties

Hawai'i Revised Statutes ("HRS") Chapter 187A authorizes DLNR to promulgate marine resource regulations and to levy administrative penalties for violations of these regulations.

1. HRS § 187A-5: Authorizes DLNR to adopt, amend, and repeal rules concerning aquatic life, including setting size and bag limits, gear limitations, bait limitations, and open and closed fishing seasons.
2. HRS § 187A-12.5(a): Authorizes the Board to set, charge, and collect administrative fines and to recover administrative fees and costs.
3. HRS § 187A-12.5(c): Authorizes the Board to collect fines for non-threatened and endangered species. A first violation fine is up to \$1,000. A second violation within five years of a previous violation is up to \$2,000. A third or subsequent violation within five years of the last violation is up to \$3,000.
4. HRS § 187A-12.5(e): Authorizes the Board to fine, in addition to HRS § 187A-12.5(c), up to \$1,000 for each specimen of non-threatened or endangered aquatic life taken, killed, or injured.
5. HRS § 187A-12.5(f): Any criminal penalty for any violation of subtitle 5 of title 12 or any rule adopted thereunder shall not be deemed to preclude the State from recovering additional administrative fines, fees, and costs, including attorney's fees and costs.

D. Penalty Guidelines

Before calculating the penalty, Staff must determine the maximum statutory fine available. This will ensure that the recommendation does not exceed DLNR's authority.

With this fine maximum in mind, the monetary penalty is calculated based on this formula:

$$\text{PENALTY} = \begin{array}{l} \text{Violation Fine}^* \\ \text{plus Per-Specimen Fine}^* \\ \text{plus or minus Fine Adjustment Factors}^* \\ \text{plus Administrative Fees and Costs} \end{array}$$

* Subject to statutory cap

1. Violation and Per-Specimen Fines

The dollar value assigned to represent the gravity of the violation may take into account the violation fine and the per-specimen fine:

- First, Second, Subsequent Violation Fine: First, second, and subsequent violations for non-threatened or endangered species are described in HRS § 187A-12.5(c). Staff may use the “fine adjustment factors” (below in Part D.2) to increase or decrease the first, second, or subsequent violation fine within the bounds of the statutory maximum for all violations. Depending on the circumstances, the fine may be waived.
- Per-Specimen Fine: Per-specimen fines for non-threatened or endangered aquatic life are described in HRS § 187A-12.5(e). The fine assigned per-specimen should balance the extent of harm caused with the sensitivity of the environment impacted. The Board may consider:
 1. The sensitivity of the wildlife impacted, including but not limited to threatened or endangered species;
 2. Whether damage resulted in death to the specimen;
 3. The sensitivity of the environment impacted;
 4. Length of time of violation.

The per-specimen fine is applicable to the taking, killing, injuring, breaking, or damaging of stony corals. There is no per-specimen fine for the unlawful sale of stony corals. Fines for the unlawful sale of stony coral are subject to the first, second, and subsequent violation statutory cap.

Table 1 should be used to determine the per-specimen fine. The maximum penalty for non-threatened or endangered species is \$1,000 per specimen. Once this value is obtained, Staff may then apply the fine adjustment factors, discussed below in Part D.2.

Table 1. Fine for Taking, Killing, Injuring, Breaking, or Damaging Stony Corals

Ecological Service Value of Coral Specimen	Coral Area Value		
	High Value ⁺	Medium Value ⁺⁺	Low Value ⁺⁺⁺
High Service Value [*]	Take, Kill, Injure, Break, Damage \$1000 \$500 Minimal Damage	Take, Kill, Injure, Break, Damage \$800 \$400 Minimal Damage	Take, Kill, Injure, Break, Damage \$600 \$300 Minimal Damage
Medium Service Value ^{**}	Take, Kill, Injure, Break, Damage \$800 \$400 Minimal Damage	Take, Kill, Injure, Break, Damage \$600 \$300 Minimal Damage	Take, Kill, Injure, Break, Damage \$400 \$200 Minimal Damage
Low Service Value ^{***}	Take, Kill, Injure, Break, Damage \$600 \$300 Minimal Damage	Take, Kill, Injure, Break, Damage \$400 \$200 Minimal Damage	Take, Kill, Injure, Break, Damage \$200 \$100 Minimal Damage

⁺ High Coral Area Value = Greater than fifty percent coral cover; or high complexity;² or high rugosity³ (1.5 or greater).

⁺⁺ Medium Coral Area Value = Twenty to forty-nine percent coral cover; or medium complexity; or medium rugosity (1.2-1.49).

⁺⁺⁺ Low Coral Area Value = Less than twenty percent coral cover; or low complexity; or low rugosity (less than 1.2).

^{*} High Ecological Service Value = Greater than eighty centimeters colony size for massive lobe morphology and/or branching morphology.⁴

^{**} Medium Ecological Service Value = Twenty to eighty centimeters colony size for lobe morphology and/or branching morphology, or greater than twenty centimeters for finger morphology.

^{***} Low Ecological Service Value = Less than twenty centimeters for all lobe, branching, and finger morphology, and crustose corals.

² Kolinski, S.P. et al. 2007. Pre-assessment Report of Injury to Coral Reef Resources and Habitat in Association with the Grounding and Removal of M/V Cape Flattery, Barbers Point, Oahu. Resource Trustees Agencies Report, 78 pp.

³ Friedlander, A.M., E.K. Brown, and M.E. Monaco. 2007. Defining Reef Fish Habitat Utilization Patterns in Hawaii: Comparisons between MPAs and Areas Open to Fishing. *Marine Ecology Progress Series* 351:221-233.

⁴ Maragos, J.E. et al. 2004. 2000-2002 Rapid Ecological Assessment of Corals (Anthozoa) on Shallow Reefs of the Northwestern Hawaiian Islands Part I. *Pacific Science* vol. 58, no. 2:215.

2. *Fine Adjustment Factors*

The fine component may be increased (aggravated) or decreased (mitigated) by the Board depending on certain documented factors.

Aggravating Factors

- Willfulness or gross negligence.
- Recalcitrance (bad faith; unjustified delay in preventing or mitigating the violation).
- History of noncompliance and the similarity to this noncompliance.
- Location of incident within a marine managed area (including MLCD or FMA).
- Other Factors as Justice May Require: Encompasses factors that may increase a fine amount that this policy cannot foresee.

Mitigating Factors

- Quick settlement or avoidance of contested case.
- Documented cooperation with DLNR.
- Other Factors as Justice May Require: Encompasses factors that may decrease a fine amount that this policy cannot foresee.

3. *Administrative Fees and Costs*

DLNR is authorized by HRS §187A-12.5(a) to recover administrative costs and fees associated with investigation and enforcement of cases. Staff may, upon consideration of relevant adjustment factors, reduce or waive the fees and costs charged to the party. Factors that may lead to reduction in fees and costs include whether the party was documented to be forthright about the violation and whether the party took documented steps to minimize damage during the event and cooperated with DLNR's investigation.

Administrative fees and costs are in addition to the administrative fine levied. Administrative fees and costs are not subject to the statutory caps in HRS §187A-12.5(b)-(e).

4. *Ability to Pay*

Generally, Staff will not request penalties clearly beyond the means of the violator. But, a financially-troubled business must not rely on this as a way to avoid paying its fair penalty, especially in cases of gross negligence or willful misconduct. DLNR reserves the option of seeking a penalty that might contribute to a company going out of business. The ability-to-pay factor should be considered only if the party raises it as an issue and only if the party provides all necessary financial information to evaluate the claim. The party has the burden to prove inability to pay. The Board may consider a "delayed payment" schedule for those who cannot pay up front.

5. *Disposition of Fines and Fees*

To the extent DLNR is authorized to accept fines, DAR may request that the Board expend moneys for:

1. Restoration or compensatory mitigation of coral reef resources;
2. Education and public outreach related to coral reefs;
3. Marine-based enforcement efforts.